No. 12282

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT RICHTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

The appellant was indicted for failure to register under the provisions of the Selective Training and Service Act of 1948 (62 Stat. 604, 50 U. S. C. App. 98). The indictment was filed on November 3, 1948 [T. 2]. The District Court had jurisdiction of the cause under Title 18, Section 3231, effective September 1, 1948, which confers on the District Courts original jurisdiction of all offenses against the laws of the United States.

The offense charged was committed in the County of Los Angeles, State of California [T. 2]. On the 15th day of November, 1948, the defendant appeared before the District Court for the Central Division of the Southern

District of California for arraignment and plea and entered a plea of not guilty [T. 3]. Thereafter, the cause was tried by the Court pursuant to a waiver of jury signed by appellant [T. 4, 5]. The appellant was found guilty of the offense charged in the indictment [T. 8] and on May 16, 1949, was sentenced [T. 14, 15, 16]. An affidavit and application for leave to prosecute an appeal *in forma pauperis* and order thereon were filed on May 25, 1949 [T. 17, 18, 19]. A Notice of Appeal was filed on May 25, 1949 [T. 20, 21], and the appeal perfected thereafter [T. 22, 23].

This Court has jurisdiction under the provisions of Title 28, Section 1291, of the United States Code.

Questions Involved.

(1) Does Congress have constitutional power to raise a peace-time army by conscription?

(2) Does enforced compliance with the registration provisions of the Selective Training and Service Act of 1948 violate appellant's freedom of religion under the First Amendment?

(3) Are the registration provisions of the Selective Training and Service Act of 1948 separable from the other provisions of said Act?

(4) Does the Selective Training and Service Act of 1948 abridge freedom of religion in violation of the First Amendment by conferring the privilege of exemption only upon those conscientious objectors who believe in a Supreme Being?

ARGUMENT.

Since there are no cases dealing with the constitutionality of the Selective Training and Service Act of 1948 that are concerned with the points involved herein, it is necessary to cite cases pertaining to the constitutionality of an act which is similar in scope and nature to this Act. The Selective Training and Service Act of 1940 is very similar to the Selective Training and Service Act of 1948, and there are many cases under the earlier Act, involving constitutional questions, which can be applied with the same force and effect to the present service law.

In *Hall v. Union Light, Heat & Power Co.,* 53 Fed. Supp. 817 (1944), the Court stated:

> "It must be borne in mind that while the country was not at war the time this statute was enacted its purpose was for the general welfare and preparation for any eventuality. No rule of statutory construction is more readily applied by the courts than that public statutes dealing with the welfare of the whole people are to have a liberal construction. The general rule that legislators, as well as judges, must obey and support the constitution and have weighed the constitutional validity of every act they pass, giving to each statute the presumption of constitutionality, is of itself sufficient reason to sustain the validity of the act in question. I strongly adhere to the rule that every reasonable doubt must be resolved in favor of a statute and not against it and that *it should not be adjudged invalid unless its violation of the constitution is clear, complete, and unmistakable.*"

Congress Does Have Constitutional Power to Raise a Peace-Time Army by Conscription.

Although this question is prematurely raised by appellant, there is no doubt that Congress does have the power to raise a peace time army by conscription. The cases hereinafter cited will also be of interest to the Court in connection with one of the principal questions involved in this appeal, that is, whether or not enforced compliance with the registration provisions of the Selective Training and Service Act of 1948 violate appellant's freedom of religion under the First Amendment.

As early as 1890 the Supreme Court stated in *In re Grimley,* 137 U. S. 147:

> "The government has the right to military service of all of its able-bodied citizens and may, when emergency arises, justly exact that service from all."

In *Burroughs v. Peyton* (1864), 16 Gratt (Va.) 470, it is said:

> "The power of coercing the citizen to render military service is indeed a transcendent power, in the hands of any government; but so far from being inconsistent with liberty, it is essential to its preservation. *A nation cannot foresee the dangers to which it may be exposed; it must therefore grant to its government a power equal to every possible emergency; and this can only be done by giving to it the control of its whole military strength. The danger that the power may be abused cannot render it proper to withhold it; for it is necessary to the national life.*"

Also see:

United States v. Tarble (1871), 13 Wall. (U. S.) 397;

Lanahan v. Birge (1862), 30 Conn. 438;

Kneedler v. Lane (1863), 45 Pa. 238.

In *United States v. Garst,* 39 Fed. Supp. 367, the Court related certain historic events to further support this principle of law:

> "The legislative history of the Constitution itself disposes of the contention by the defendant in this case that the power 'To raise and support Armies' is limited to volunteer service in such armies in peace time.
>
> "On May 29, 1790, the Rhode Island Convention proposed an amendment to the Constitution specifically providing: 'That no person shall be compelled to do military service otherwise than by voluntary enlistment, except in cases of general invasion; anything in the second paragraph of the Sixth Article of the Constitution or any law made under the Constitution to the contrary notwithstanding' 1 Elliot's Debates, p. 336.
>
> "This proposed amendment indicates conclusively that it was universally accepted at the time that the Constitution definitely empowered Congress 'to raise and support armies' by conscription in time of peace. The legislative history discloses that the Rhode Island Convention's amendment limiting conscription to cases of general invasion was never acted upon. This certainly demonstrates that the framers of the Constitution intended that the power 'To raise and support Armies' should include conscription in time of peace.
>
> "The following excerpt from an article by Alexander Hamilton in The Federalist (No. XXIV), written at the time that the proposal was made to limit the congressional power 'To raise and support Armies,' is highly significant and enlightening as to the interpretation and intendment of the Constitution makers on the subject of the disputed provision. Said Alexander Hamilton: 'If to obviate this conse-

quence' (the danger of usurpation of power by a combination of the executive and legislative in time of peace), 'it should be resolved to extend the prohibition to the raising of armies in time of peace, the United States would then exhibit the most extrardinary spectacle which the world has yet seen—that of a nation incapacitated by its Constitution before it was actually invaded. As the ceremony of a formal declaration of war has of late fallen into disuse, the presence of any enemy within our territories must be waited for, as the legal warrant to the Government to begin its levies of men for the protection of the state. We must receive the blow before we could even prepare to return it."

The above quoted excerpt from the article by Alexander Hamilton in The Federalist was also set forth in *United States v. Lambert,* 123 F. 2d 395, 3d Cir. (1941).

In *United States v. Cornell,* 36 Fed. Supp. 81, at page 83, the Court reiterated the holdings of the earlier decisions:

"Our national history and court decisions uniformly have recognized the existence of the power of Congress under the Constitution to compel military service of a citizen in case of need, when it so declares, whether in peace time or war time, and to make preparation, if Congress declares that it is imperative or necessary, or that an emergency exists requiring the raising and support of an army.

* * * * * * * *

It is not within the province of the Courts to say that Congress was mistaken in saying that it was imperative to increase the military forces of the United States, for as has been said, that under the Constitution, Congress has exclusive power to say when and under what circumstances a situation exists,

> that it is imperative to increase and train the personnel of the armed forces of the United States and requiring the citizens to render military service in case of need."

Also see *United States v. Herling,* 120 F. 2d 236, 2nd Cir. (1941), where the Court held that the Selective Training and Service Act of 1940 and the regulations thereunder were valid although there had been no formal declaration of war.

Enforced Compliance With the Registration Provisions of the Selective Training and Service Act of 1948 Does Not Violate Appellant's Freedom of Religion Under the First Amendment.

Just as the United States clearly possesses the power to raise an army in peace time by conscription, it possesses the constitutional power to require registration of its male citizens during peacetime under the provisions of the Selective Training and Service Act of 1948. The nondiscriminatory exercise of such power does not constitute an abridgment of the freedom of religion of any person. In *Local Draft Board No. 1 v. Connors,* 124 F. 2d 388, 9th Cir. (1941), the Court held:

> "It is within the congressional power to call everyone to the colors. No one under the jurisdiction of the sovereign nation, whatever his or her status, is exempt except by the grace of the government."

Since it is within the power of Congress to call everyone to the colors without exemption, there is no basis in reason or policy for this Court to hold that Congress does not have the power to require that its male citizens merely register without exemption under the Selective Training

and Service Act of 1948. In *United States v. Rappeport,* 36 Fed. Supp. 915, the Court held:

> "Accordingly Congress undoubtedly has the power to seek information through registration or otherwise in peacetime in order to be prepared for the intelligent exercise of its power to raise armies by conscription * * *"

See also *Stone v. Christensen,* 36 Fed. Supp. 739, at 743, where the Selective Training and Service Act provisions for peacetime registration were held to be constitutional. The Court stated succinctly:

> "In this present period, the wars undeclared under the law of nations, the disregard of international convention, the hostile concentrations cloaked by manifestos of pacific intention, the elimination of time and distance as ponderable factors, the lightning strokes of modern arms are actualities over which the words 'at peace' cannot be permitted to tyrannize in making judgments. * * * but whether events prove we are at war, in a state of war, or clinging to an equivocal neutrality, *a failure to register manpower of the country would be a failure to provide for 'the common defense.'"* (Italics supplied.)

In *United States v. Lambert, supra,* 123 F. 2d 395, 3d Cir. (1941), the Court held that the power of Congress to compel registration for military service and training is not limited to actions taken after a formal declaration of war.

In *United States v. Brooks,* 54 Fed. Supp. 995 (1944), at page 996, the Court made the following comment:

> "Respect for the integrity of conscience is unquestionably firmly embedded in our constitutional

foundations. Reason finds it difficult to comprehend the appeal for the shelter of the Constitution by one who is unwilling to defend the Constitution. Logic looks askance at one who, asserting his right to freedom of religion, refuses to have any share in resisting an enemy who has declared war upon us and whose first act in every land he has invaded has been to abolish freedom of religion."

The Court went on to quote from *West Virginia Board of Education v. Barnette,* 319 U. S. 624, as follows:

"No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are * * * imperatively necessary to protect society as a whole from grave and pressingly imminent dangers. * * *"

In *Hamilton v. Regents, supra,* 293 U. S. 245, at pages 267-268, the Court remarked as follows:

"Never in our history has the notion been accepted, or even it is believed, advanced, that acts * * * indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state. * * * Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as immoral. The right of private judgment has never yet been exalted above the powers

and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law."

See also:

In re Summers, 325 U. S. 561, 571 (1945);

United States v. Moriarity, 106 Fed. 886, 891-892 (Cir. Ct., N. Y., 1901).

In *Hopper v. United States,* 142 F. 2d 181, 9th Cir. (1943), the Court commented:

"A few points remain to be noticed. Appellant attacks the Selective Service Act as unconstitutional on the ground that it prohibits the free exercise of religion, deprives appellant of liberty and property without due process, and condemns him to involuntary servitude not as punishment for crime. Also that the Act delegates legislative powers. These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have uniformly met with rejection. Selective Draft Law Cases (Arver v. United States), 245 U. S. 366, 38 S. Ct. 159, 62 L. Ed. 349, L. R. A. 1918 C, 361, Ann. Cas. 1918B, 856;"

In *Bronemann v. United States,* 138 F. 2d 333, 8th Cir. (1943), it was held:

"For the whole class of persons the procedure set up by the Act provides to the individual the full protection of due process of law throughout the proceedings by which his general liability to military service becomes a fixed obligation through his selection and induction into such service."

Further, in *Rase v. United States,* 129 F. 2d 204, 6th Cir. (1942), the Court stated:

> "The Constitution grants no immunity from military service because of religious convictions or activities. Immunity arises solely through Congressional grace in pursuance of a traditional American policy of deference to conscientious objection and Holy calling."

In *United States v. Newman,* 44 Fed. Supp. 817 (1942), it was again held:

> "The grant of exemption to conscientious objectors is not a matter of constitutional right but wholly an act of grace upon the part of Congress."

The Registration Provisions of the Selective Training and Service Act of 1948 Are Separable From the Other Provisions of Said Act.

It is clear that the registration provisions of the Selective Training and Service Act of 1948 are separable from the other provisions of this Act.

In *Stone v. Christensen, supra,* 36 Fed. Supp. 739, Harry W. Stone brought a complaint against the Chief Registrar for the draft at Monmouth, Oregon, for a judgment declaring that the plaintiff did not have to register under the terms of the Selective Training and Service Act of 1940, and to restrain prosecution of the plaintiff for failure to register. The grounds urged for relief were that the registration would subject Stone to military training and he would thereby be deprived of liberty and property without due process of law and that he would undergo involuntary servitude in derogation of the Federal Constitution. However, the Court held:

> "The allegations of the petition do not by inference suggest that plaintiff is threatened with service in the

army or in any way, except as a result of registration. But he has not registered. If he had registered he would not be subjected to military law nor liable to courtmartial until after induction, which includes swearing allegiance. Prior to that time he is still entitled to protection of any rights he may have by the civil tribunals. This circumstance differentiates the case from those arising under the Selective Service Act of 1917, 50 U. S. C. A. Appendix, §201 *et seq.*, where an eligible individual, whether registered or not, could be subjected to military law by the sending of an order for him to report. *No allegation of damage or unconstitutionality can therefore be properly based upon any fact except the liability to register.* According to the express terms of the law under consideration, the clauses thereof are severable. The validity of no one provision depends upon another." (Italics supplied.)

In *United States v. Rappeport, supra,* 36 Fed. Supp. 915, the Court also stated that the registration provisions of the Selective Training and Service Act of 1940 were separable:

"Section 14(b) of the statute, * * * expressly provides that if any provision of the Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby. *This creates a presumption of separability of the provisions of the Act* and indicates that Congress intended that valid

portions of the statute are to be effective in spite of the invalidity of other provisions thereof."

* * * * * * * *

"The defendant's contention that by submitting to the registration they would be held to have subjected themselves to all the provisions of the Act and to have waived their right to assert the invalidity of the other provisions of the Act cannot be sustained. The registration provision is so independent of the other sections of the Act that *it may be considered as though it is a separate statute,* submission to which does not affect the right to challenge the constitutionality of the other sections." (Italics supplied.)

As set forth above, the registration provisions of the Selective Training and Service Act of 1940 were separable because the validity of no one provision depended upon another by the terms of the Act itself. The present Act of 1948 contains a similar section [Sec. 465(c)].

In *United States v. Sugar,* 243 Fed. 423, the Court stated with regard to the Conscription Act of 1917:

"It is therefore unnecessary to consider the questions whether * * * these defendants, charged as they are with a crime growing out of a refusal to register under the act, are entitled to invoke in their defense the unconstitutionality of an entirely separate and distinct portion of the act, having no relation to the provision requiring registration. This objection is clearly untenable and must be overruled."

The Selective Training and Service Act of 1948 Does Not Abridge Freedom of Religion in Violation of the First Amendment by Conferring the Privilege of Exemption Only Upon Those Conscientious Objectors Who Believe in a Supreme Being (50 U. S. C. Appendix, Section 456(j)).

Since the registration provisions are separable from the other provisions of the Selective Training and Service Act of 1948, appellant now has no standing to challenge the constitutional validity of either the exemption or conscription provisions of the Act. Further, the provision in the Selective Training and Service Act of 1948 which provides that no person who by reason of religious training and belief is conscientiously opposed to participation in war in any form shall be subject to combatant training and service in the armed forces of the United States, and that religious training and belief in this connection means an individual's belief in relation to a Supreme Being, does not abridge freedom of religion in violation of the First Amendment.

In the *Selective Draft Law Cases (Arver v. U. S.),* 245 U. S. 366, the Court had under consideration the draft law of 1917. This Act exempted from subjection to the draft members of *certain enumerated religious sects* whose tenets excluded the moral right to engage in war. At pages 389 to 390 the Court stated:

> "And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant

to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more."

The Selective Training and Service Act of 1940 included an exemption from military service by reason of religious training and belief. There was confusion under this exemption clause as to whether purely philosophical and moral beliefs would be grounds for exemption under that provision.

In *United States v. Kauten,* 133 F. 2d 703, 2d Cir. (1943), the Court held that conscientious objection to participation in any war, under any circumstances could be the basis of exemption under that Act. The Court said:

"The latter, we think, may be justly regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent as to what has always been thought a religious impulse."

Subsequently, in *United States v. Badt,* 141 F. 2d 845, 2d Cir. (1944), the Court followed the *Kauten* case. However, in 1946, in *Berman v. United States,* 156 F. 2d 377 (Petition for Writ of Certiorari to Court of Appeals for Ninth Circuit denied 329 U. S. 795, Rehearing denied 329 U. S. 833), this Court of Appeals held:

"* * * the expression 'by reason of religious training and belief' is plain language, and was written into the statute for the specific purpose of distinguish-

> ing between the conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one. * * * However, no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of diety cannot be said to be religion in the sense of that term as it is used in the statute."

When the Selective Training and Service Act of 1948 was drafted, its language followed the holding of this circuit in the *Berman* case in that it defined religious training and belief as meaning "an individual's belief in the relation to a Supreme Being involving duties superior to those arising from any human relation but does not include essentially political, sociologocial or philosophical views or a merely personal moral code."

Conclusion.

In conclusion, it is respectfully submitted that:

(1) Congress does have constitutional power to raise a peacetime army by conscription;

(2) Enforced compliance with the registration provisions of the Selective Training and Service Act of 1948 does not violate appellant's freedom of religion under the First Amendment;

(3) The registration provisions of the Selective Training and Service Act of 1948 are separable from the other

provisions of said Act and therefore appellant has no standing to challenge the constitutional validity of either the exemption or conscription provisions of the Act; and

(4) Further, the Selective Training and Service Act of 1948 does not abridge freedom of religion in violation of the First Amendment by conferring the privilege of exemption only upon those conscientious objectors who believe in a Supreme Being.

Respectfully submitted,

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